

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK, JUDGE

IN RE LIDODERM ANTITRUST LITIGATION) No. 14-MDL-02521-WHO

San Francisco, California
Wednesday, September 12, 2018

TRANSCRIPT OF PROCEEDINGS

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Official Reporter, U.S. District Court

(Appearances continued, next page)

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Wednesday - September 12, 2018

2:03 p.m.

P R O C E E D I N G S

THE CLERK: Calling Civil Matter 14-2521, In Re:
Lidoderm Antitrust.

Counsel, please come forward and state your appearances.

MS. SHARP: Good afternoon, Your Honor. Dena Sharp,
Girard Gibbs, for the end-payor plaintiffs.

THE COURT: Good afternoon.

MS. STEINER: Renae Steiner, Heins, Mills & Olson, for
end-payor plaintiffs.

MR. KOHN: Good afternoon, Your Honor. Peter Kohn
from Faruqi & Faruqi, for the direct purchaser plaintiffs.

With me today are Joe Oppen from the Garwin Gerstein firm,
co-lead counsel for the directs, and David Nalven of Hagens
Berman, also for the directs.

THE COURT: Welcome, all.

MR. LAWRENCE: Good afternoon, Your Honor. Gerald
Lawrence on behalf of GEHA and the 17 independent plans that
opted back into the class.

THE COURT: All right. Good afternoon.

MS. HUBBARD: Good afternoon, Your Honor. Heidi
Hubbard from Williams & Connolly, on behalf of Endo.

MR. ASIMOW: And good afternoon, Your Honor. Daniel
Asimow, Arnold & Porter, also on behalf of Endo.

MR. MECKES: Good afternoon, Your Honor. Joe Meckes

1 from Squire Patton Boggs, for the Teikoku defendants.

2 **MR. TEPE:** Good afternoon, Your Honor. Sean Tepe,
3 Skadden Arps, on behalf of the Watson defendants.

4 **THE COURT:** Well, welcome everybody. Glad to see you
5 all again.

6 Is there anybody here in the audience who is here to speak
7 to the fairness of the settlement of In Re: Lidoderm Antitrust
8 Litigation?

9 (No response)

10 **THE COURT:** Hearing no one. Ms. Sweeney is not here.
11 So I think I will grant the order with respect to her
12 discovery, I'll sign off on that.

13 So Mr. Kohn, I would like to start with you. I have just
14 a couple of questions for you.

15 Just, in the way that your comprehensive declaration was
16 organized, there are some things that I thought it would be
17 helpful if we just got clearly on the record.

18 **MR. KOHN:** Yes, Your Honor.

19 **THE COURT:** And the first one is: Can you describe
20 for me the steps that you took to ensure that this class action
21 was handled in an efficient manner, given all of the people who
22 were working on it?

23 **MR. KOHN:** Yes, Your Honor. There were several ways.

24 The first thing we did was that we made sure that
25 everybody understood that work that was not authorized by

1 co-lead counsel could not be performed. And we did that
2 immediately following our appointment as co-lead counsel.

3 The second thing we did was we had weekly meetings. And
4 the weekly meetings were attended, they were presided by --
5 upon by co-lead counsel. They were attended by all of the
6 document reviewers. And the documents reviewers were divided
7 up into teams. And the teams did not have any overlap with one
8 another.

9 And attorneys were placed on a team, whether the team was
10 the patent litigation team or the causation team, or the
11 economics team, or the agreements team, for instance, based on
12 the experience of those attorneys. So that there was really
13 nobody who was climbing up a learning curve, and learning in
14 the course of the Lidoderm antitrust litigation.

15 Each of these teams was directed to take the 3.6 million
16 pages of documents that the defendants produced, to formulate
17 search strategies in order to get the documents that were
18 relevant to that particular team's particular issues, and
19 assemble a white paper in order to assist the deposition-takers
20 in later taking depositions and in understanding the case.

21 Before any of the teams could do those searches, they had
22 to send the proposed searches to co-lead counsel. And we,
23 instead of having people, through trial and error, just do
24 things, and then it was a mistake, and do it again, we signed
25 off on their searches. So we made sure that we were all in

1 agreement that the document searching would be done once, and
2 it would be done right, and it would be done in a
3 non-duplicative manner.

4 After that, we would continue to have calls. And I often
5 presided over these calls. And I would put the members of each
6 of the teams on the spot to talk about where they were in the
7 course of their review, and what things were looking like. And
8 we put some very tough questions to people.

9 These calls lasted about an hour. And they -- and
10 somebody was put on the spot from each team during each of the
11 calls and they were held weekly.

12 After that was done, and after each of the teams had
13 assembled the documents that they thought they needed for a
14 particular issue, they were to put together what was called a
15 white paper. And this was to be an annotated compendium of the
16 documents, their significance, and their proposed use for the
17 issues in the case.

18 The white papers were not freeform. Just like the
19 searches were signed off on by co-lead counsel, the structure
20 of these white papers were, at first, outlines. And each team
21 had an outline. And co-lead counsel signed off on each outline
22 before it was populated with the documents, so it could be done
23 once in a non-duplicative manner.

24 Those white papers went through three revisions. Not
25 because of duplication, but because of continued production by

1 the defendants.

2 There was a pre-production in the case that preceded the
3 Court's decision on the motion to dismiss. That was the first
4 thing the teams went through. And then there were at least two
5 productions thereafter, before the end of fact discovery.

6 Those white papers were very efficient because they formed
7 the basis for the deposition-takers to decide what documents
8 they would be using in order to take the depositions.

9 I have been in many cases where document reviewers review
10 documents, write white papers, and then deposition-takers do it
11 all over again, and completely re-prepare the case, doing
12 document review, having their own team to do the document
13 review, in preparation for a deposition. That's highly
14 inefficient. And it was something that I determined would not
15 occur in this case.

16 And so the deposition-takers, who were not people who were
17 not learned in the particular area that the fact witness was to
18 cover, but who, instead, were people who were up the learning
19 curve on that subject matter, would take the white papers for
20 that particular subject, would extract the documents. And any
21 supplemental searching was very limited. And this made for
22 deposition preparation that was extremely efficient.

23 The directs were not the only ones that were involved in
24 the process just before depositions were taken. In the
25 beginning we were -- you know, we kind of ran, ran the show.

1 But midway through, the end-payors were assigned to the various
2 teams, as well. And they assisted us. And in that way, there
3 was an added layer of efficiency.

4 So for instance, Ms. Sharp was on the agreements team.
5 And the agreements team divided up even further, for efficiency
6 purposes, to an Endo team, a Watson team, and a Teikoku team.
7 And Ms. Sharp was part of the Teikoku team, along with
8 Mr. Nalven.

9 And in this way, they gained expertise. And so they
10 weren't having to relearn the cases to Endo or the cases to
11 Watson, trial preparation aside. But during discovery, they
12 didn't have to learn those other parts of the cases. They were
13 specializing. That added efficiency. And it wasn't just
14 efficiency with the directs; it was efficiency among all of the
15 counsel who were preparing the case.

16 The same general thing happened in expert discovery. If
17 there was a lawyer who had a particular expertise, he or she
18 would end up handling our particular expert on that subject
19 matter.

20 Well, instead of having somebody completely different deal
21 with the 15 experts the defendants found to oppose our experts,
22 we had those same people handling the defense experts who
23 handled the plaintiff experts. So they defended the plaintiff
24 expert depositions, and they took the defense expert
25 depositions.

1 So I think the basic theme that Your Honor is probably
2 hearing from me is that we had specialization within the direct
3 purchasers. And we utilized that specialization to ensure that
4 people were not duplicating everybody else's work.

5 **THE COURT:** Two other things struck me.

6 In comparing the expenses of the EPPs as opposed to the
7 DPPs, the expenses -- travel, meals, hotel -- were almost twice
8 the amount for the DPPs as the EPPs.

9 **MR. KOHN:** Uh-huh.

10 **THE COURT:** And so, if you could explain that.

11 **MR. KOHN:** I think -- and this is a hypothesis,
12 Your Honor, because I haven't made a study of what it is that
13 you just asked.

14 But my hypothesis would be that because the DPPss took the
15 bulk of the expert depositions and the fact depositions --
16 which is not to say that the EPPs did not contribute. Please,
17 don't get me wrong. But because of just the sheer numbers, I
18 think there was probably more travel involved.

19 I would have to make a study, though, of what Your Honor
20 is talking about in terms of travel expenses.

21 Speaking for myself, I found -- I only took BART. I still
22 have my BART card here (Indicating). And I know that from SFO
23 to Montgomery is \$9.65.

24 And, and I made it a game to find hotels in San Francisco
25 under \$200 a night. And it was a challenging game, but I

1 almost --

2 **THE COURT:** That's a good game.

3 **MR. KOHN:** I almost always won.

4 And -- but if the Court would like, I will take a harder
5 look at the travel expenses, and see what I can see.

6 **THE COURT:** Well, my supposition was that you ended up
7 taking closer to two-thirds of the depositions.

8 **MR. KOHN:** (Nods head)

9 **THE COURT:** And to me, that probably is the
10 explanation. But I just -- I wanted to see what you thought.

11 What about -- the rate of contract attorneys was also
12 different between the two groups. Yours was between 490 to 590
13 an hour, and the EPPs were 350 an hour.

14 What explains that, if you know?

15 **MR. KOHN:** I don't know. I personally don't use
16 contract attorneys. And so it's not my preferred way of
17 reviewing documents.

18 And frankly, I didn't even know there were contract
19 attorneys, I will confess here at the bar of the Court. And I
20 will look into that, if the Court would like.

21 **THE COURT:** Let me ask you another question.

22 Do you know the amount that RG2 has charged to date, and
23 what the ultimate charges are likely to be?

24 **MR. KOHN:** It's not going to be high. I think it's --
25 it's -- I don't actually know what it is.

1 The Court should know that during the notice phase, the
2 claims administrator charged maybe \$5,000. During the entirety
3 of the claims administration phase, I would be shocked if the
4 number ended up much above \$20,000.

5 **THE COURT:** All right. Well, so those were my
6 questions.

7 The settlement amount that you achieved is an excellent
8 amount. And is certainly approvable as being fair, reasonable
9 and adequate to the class.

10 With respect to the attorneys' fees, you undertook serious
11 risk in this case. As I said throughout the litigation, the
12 lawyering on both sides -- but now I'm just talking to you
13 because it's your money on the line -- was excellent. And very
14 much appreciated.

15 This case involved complicated discovery and complicated
16 and novel legal issues. And so the multiplier that you seek of
17 your fees is modest, at 1.05. And the incentives you seek are
18 not modest for each of the three representatives, but I think
19 they fall within the reasonable range of 100,000.

20 So, I am -- I'm going to grant the -- both the motion and
21 the request for fees.

22 I would be interested in answers to the questions that I
23 raised. But neither of them would -- all I would end up doing
24 with the expenses, if the expenses seemed overcharged, would be
25 to funnel them back into the attorneys' fees, given what I've

1 just said about the work that was done.

2 So, congratulations.

3 **MR. KOHN:** Thank you, Your Honor. It's been a
4 pleasure.

5 **THE COURT:** Ms. Sharp.

6 **MS. SHARP:** Thank you, Your Honor. Dena Sharp.

7 **THE COURT:** So I don't have the same questions for
8 you, because I could figure out more readily from your
9 declarations how the efficiencies were achieved with the EPPs.

10 And so I guess my question for you: Right now, how many
11 consumer claims have been made?

12 And what's the expectation?

13 **MS. SHARP:** Sure. So let me update the Court a bit on
14 that.

15 The Court has before it the declaration of Carla Peak from
16 KCC. And that is at ECF No. 1036-2. That provided the numbers
17 that we had as of September 4th. We have a few updates to
18 that.

19 **THE COURT:** Okay.

20 **MS. SHARP:** We now have well over 25,000 claims from
21 consumers. More like 28,000. Which is nothing to sneeze at,
22 we would say.

23 The website has experienced more than 140,000 hits. And
24 so we can surmise from that, that the notice has been
25 effective. And of course, the reach there is expected to be

1 80 percent of the consumer class, so that's a pretty
2 substantial number of folks.

3 With regard to the third-party payors, the claims rate
4 there is not yet as robust as we would expect. But as set
5 forth in Ms. Peak's declaration, third-party payors tend to do
6 what so many of us do, I guess, and wait until close to the
7 deadline. And that has been borne out by experience by most of
8 our colleagues here (Indicating).

9 For example, GEHA and the separately-represented end
10 payors have not yet submitted claims.

11 My office has also spoken to several third-party payors
12 with whom we've been in touch throughout the litigation.
13 And -- just to check in, make sure everything's okay. And
14 without fail, every one of them confirms: Yeah, we're working
15 through it; we've been working with the claims administrator;
16 we're going to submit those claims as soon as we can.

17 So everything appears to be on track. We don't have any
18 reason to believe we're going to have problems paying out the
19 fund.

20 And of course, the plan of allocation sets forth how that
21 would happen, in the event that we do get, you know,
22 substantial claims from the consumers, and can pay them out
23 fully, and then spill over to the third-party payor pool if it
24 comes to that.

25 **THE COURT:** All right. So, again, I -- you know, I

1 should let -- I should have probably let the -- see whether any
2 of the defendants wanted to say anything with respect to the
3 settlement before I continue on granting what I intend to
4 grant.

5 Does anybody want to chime in at this point?

6 **MS. HUBBARD:** Your Honor, this is one of the rare
7 times when I'm going to sit here and not talk in court.

8 **THE COURT:** All right.

9 Well, so, again, the settlement that the end payors
10 achieved was excellent, and is certainly approvable as being
11 fair, reasonable and adequate. And I will approve it.

12 And if there was ever a case for a multiplier, I think
13 this is that case. Because of the very high risk, the
14 expensive nature of this, the high-quality lawyering, and the
15 result. So I'm going to approve the fee request, as stated.

16 The incentives are -- awards are also fine, at 10,000.
17 So, I am -- I'm ready to go.

18 But, I guess Ms. Steiner doesn't want me to approve it,
19 so...

20 **MS. STEINER:** I hate to look a gift horse in the
21 mouth, Your Honor.

22 But we did realize we had failed to submit one expense
23 which was some of the trial work, deposition of Cutting, we
24 didn't get the bill until after we submitted. So it's another
25 \$3,642.50.

1 **THE COURT:** Forget it. So, say it again. It's
2 three-thousand --

3 **MS. STEINER:** It's \$3,642.50. And we can submit an
4 order with that number in, or we can hand you this Post-It note
5 (Indicating), which is how we did it today. Either way.

6 **THE COURT:** I think the order might work better. So
7 if you would do that, that would be fine.

8 **MS. STEINER:** Okay, thank you.

9 **THE COURT:** So then we have the issue with respect to,
10 I guess, GEHA and the expenses.

11 **MR. LAWRENCE:** Yes, Your Honor. Gerald Lawrence,
12 Your Honor, on behalf of GEHA and the 17 separately represented
13 large health plans.

14 **THE COURT:** So explain why the expenses for document
15 hosting and Dr. Melnick were not duplicative.

16 **MR. LAWRENCE:** Absolutely, Your Honor. If I could say
17 three things, sort of set some context of who we are, who we
18 represent.

19 Secondly, a brief bit of legal argument about why they
20 were not.

21 And then, I could also address the specifics of them as
22 well, if you'd like.

23 **THE COURT:** Okay.

24 **MR. LAWRENCE:** Our clients, in addition to GEHA who
25 actively litigated the case -- and, as you know, we

1 participated in deposition, we questioned witnesses.

2 Mr. St. Phillip was here in front of Your Honor many times.

3 We also represented 17 large health plans, including
4 Aetna, Cigna, Humana, Anthem. We had three to five of the
5 largest health plans in the country who, themselves, have
6 almost a 40 percent market share of covered lives.
7 Collectively, that group is in the neighborhood of two-thirds
8 of the collective -- covered lives with insurance, private
9 insurance, in the United States.

10 The standard -- which is not easy to find because it's not
11 often that you have these independently-represented plans that
12 would incur expenses, and then opt back into part of the class.
13 But the standard in the *Hughes Aircraft* case says that if you
14 create, increase, or preserve a fund, you are entitled to
15 recover your costs. And that's a Ninth Circuit case, 557 F.2d,
16 that's on Page 769.

17 Applying that standard, if you look at this, did we bring
18 value to this fund?

19 And I think that, without question, we did.

20 **THE COURT:** But -- and you've been compensated in --
21 for at least some of those expenses. It's just these two
22 categories that I'm interested in hearing about.

23 **MR. LAWRENCE:** Absolutely correct, Your Honor.

24 And first of all, I want to say I respect counsel's right
25 (Indicating) to say that they did not feel comfortable in

1 submitting those to the Court.

2 You know, I'm a former member of the Disciplinary Board in
3 Pennsylvania, I'm on the Board of Law Examiners. I deal a lot
4 with attorney ethics issues. And I very much respect them for
5 saying to the Court that this is a close call. It is. I'll
6 readily admit that. Put it before Your Honor, and we're going
7 to trust Your Honor's judgment on this.

8 They're not duplicative, because for us to bring that
9 value, for us to increase the leverage to drive the settlement
10 to the level that it was, which, Your Honor acknowledged it's
11 an outstanding settlement, and for us to bring that increased
12 recovery to the class, we had to engage in the litigation of
13 the case.

14 And in order to engage in the litigation of the case, we
15 had to have our clients' documents, which weren't part of their
16 server.

17 And then we also had on that server the defendant's
18 documents for our attorneys in our office that were working
19 independently, but in a supportive role, that were
20 participating in this litigation, to be able to review those
21 documents.

22 Similarly with Dr. Melnick's report. For Dr. Melnick to
23 do that report, we needed those documents. That report was
24 necessary for us to understand the theories of the case. It
25 was ultimately put before the Court as part of the -- as an

1 exhibit, and cited in the motion for summary judgment.

2 Submitted by the plaintiffs.

3 It was one of three reports that was cited there, that all
4 led to the same conclusion that we are hopeful are influential
5 on the Court to make the decisions that it did, which all
6 contributed to the ultimate issue: Increasing the end payor's
7 leverage, and increasing the value of the recovery of the end
8 payors.

9 That's why we think they're necessary.

10 **THE COURT:** So did you not have access to the
11 documents that the end payors had collected?

12 **MR. LAWRENCE:** That's correct, Your Honor. We did not
13 have access to their electronic system. We had to maintain our
14 own database to work with those documents.

15 **THE COURT:** Okay. And is that the document hosting
16 and review system that Ms. Sharp has identified?

17 **MR. LAWRENCE:** In the papers, right. We had our own
18 system. And it was at a cost of 184,934.13, as described in
19 the papers.

20 **THE COURT:** And at trial, if we had gone to trial,
21 would Dr. Melnick have testified on behalf of GEHA?

22 **MR. LAWRENCE:** Absolutely, Your Honor.

23 **THE COURT:** Okay.

24 Ms. Sharp, do you have anything you wanted to add with
25 respect to that?

1 **MS. SHARP:** I think not, Your Honor. We've set forth
2 our position in the papers.

3 As the Court noted, we agreed, subject, of course, to this
4 Court's approval, that more than \$350,000 worth of the expenses
5 that Lowey Dannenberg claimed were -- fell appropriately within
6 the ambit of class expenses.

7 And we otherwise commit to the sound discretion of this
8 Court the resolution on these two categories.

9 **THE COURT:** And is it correct, as -- as I was just
10 told, that GEHA didn't have access to the documents that you
11 had gathered?

12 **MS. SHARP:** That's right, Your Honor.

13 We -- we had a document review database. I would be
14 digging into my memory to even remember whether there was ever
15 a discussion about coordination on that.

16 I -- I don't think that we ever had that discussion. And
17 I don't think GEHA ever came to us and said: Hey, do you guys
18 want to share a database?

19 Obviously, we would have had that discussion in that
20 context. We were, frankly, very focused on coordinating to the
21 extent possible with the direct purchasers because we thought
22 that was the most important thing at the time.

23 But it is true, yeah.

24 **THE COURT:** So I will allow the expenses that GEHA is
25 speaking.

1 I would certainly have benefited, or the jury would have,
2 from Dr. Melnick, one way or the other. And if you didn't have
3 a way of necessarily accessing those documents, then I think
4 you needed to.

5 So --

6 **MR. LAWRENCE:** Thank Your Honor.

7 **THE COURT:** All right.

8 The one final thing is that there are motions to seal that
9 are outstanding. Is there any reason now not to deny the
10 motions to seal?

11 **MS. SHARP:** From our perspective, no.

12 **MR. KOHN:** What she said.

13 **MS. HUBBARD:** So Your Honor --

14 (Reporter interruption)

15 **MS. HUBBARD:** Sure. Heidi Hubbard.

16 So, Your Honor, we were not prepared for this issue today.
17 I understand that there may still be some confidential
18 propriety -- proprietary information of the company, but I'm
19 not prepared to say, one way or the other.

20 I know this had been an issue a number of months ago, and
21 I apologize. I think we didn't realize it was going to be an
22 issue today.

23 Would it be all right if we submitted something in the
24 very near term that answered Your Honor's question?

25 **THE COURT:** Yeah, in the very near term. I would

1 really like to get these off the books.

2 These motions to seal are the bane of my existence, and
3 others that I care about.

4 **MS. HUBBARD:** Understood, Your Honor.

5 **THE COURT:** And it is not obvious to me why -- it's
6 not obvious to me what's there, and what would still be
7 proprietary.

8 So, would you look very carefully at that, with the idea
9 of getting something to me in a week?

10 **MS. HUBBARD:** Yes.

11 **THE COURT:** And tell me if there's anything that's
12 really important, and why.

13 **MS. HUBBARD:** Absolutely, Your Honor.

14 And, I apologize. This was not an issue in which I had
15 been involved, as we were getting ready for trial. And we will
16 get on it, and get you an answer within a week.

17 **THE COURT:** Okay. Excellent.

18 **MS. HUBBARD:** Thank you.

19 **THE COURT:** Okay. Well, so, is there anything else
20 that we need to do to resolve the matters pending before this
21 Court?

22 **MS. SHARP:** Not from my perspective, Your Honor.

23 And we will submit a revised fee order, as Ms. Steiner
24 offered, forthwith.

25 **THE COURT:** Excellent.

1 **MS. SHARP:** Thank you.

2 **MR. KOHN:** (Shakes head)

3 **THE COURT:** Well, it has been pleasure to have read
4 what you write, and listen to what you say. For me this was a
5 very -- it was a fascinating case. And it was very well
6 litigated by all.

7 So, thank you all.

8 **MS. SHARP:** Thank you.

9 **MR. KOHN:** Thank Your Honor.

10 **MS. STEINER:** Thank Your Honor.

11 (Proceedings concluded)

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4 **CERTIFICATE OF REPORTER**

5 I, BELLE BALL, Official Reporter for the United States
6 Court, Northern District of California, hereby certify that the
7 foregoing is a correct transcript from the record of
8 proceedings in the above-entitled matter.
9

10 *Belle Ball*

11 /s/ Belle Ball

12 Belle Ball, CSR 8785, CRR, RDR

13 Thursday, September 13, 2018
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